JD(SF)-04-03
San Francisco, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

THEATRICAL, WARDROBE UNION, LOCAL 784, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA

AND **Case 20-CB-11109**

ODESSA McDUFFIE, AN INDIVIDUAL

Jill W. Coffman, Esq., of San Francisco, California, appearing on behalf of the General Counsel.

William A. Sokol, Esq., for Van Bourg, Weinberg, Roger, and Rosenfeld, of Oakland,California, appearing on behalf of Respondent.

Odessa McDuffie, of Oakland, California, appearing pro se.

DECISION

BURTON LITVACK: ADMINISTRATIVE LAW JUDGE

Statement of the Case

The unfair labor practice charge in the above-captioned matter was filed by Odessa McDuffie, an individual, on April 19, 1999,[1] and, after an investigation of the said charge, on June 17, 2002, the Acting Regional Director of Region 20 of the National Labor Relations Board, herein called the Board, issued a second amended complaint, alleging that Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, herein called Respondent, engaged in acts and conduct violative of Sections 8(b)(2) and 8(b)(1)(A) of the National Labor Relations Act, herein called the Act. Respondent timely filed an answer, essentially denying the allegations of the second amended complaint. Pursuant to a notice of hearing, a trial on the merits of the alleged unfair labor practices was held before the

[1] Unless otherwise stated, all dates herein occurred within calendar year 1999.

above-named administrative law judge on July 1 and 3 and August 16, 2002 in San Francisco, California. At the hearing, all parties were afforded the opportunity to call, examine and cross-examine witnesses, offer into evidence all relevant documentary evidence, argue their legal positions orally, and to file post-hearing briefs. Such post-hearing briefs were filed by counsel for the General Counsel and by counsel for Respondent and each has been carefully considered. Accordingly, based upon the entire record herein,[2] including the post-hearing briefs and my evaluation of the credibility, while testifying, of Odessa McDuffie, I make the following:

FINDINGS OF FACT

I. Jurisdiction

Respondent admits that, at all times material herein, the Shorenstein-Hays/Nederlander Organization (SHN), a partnership with an office and places of business located in San Francisco, California, has been engaged in the business of operating the Curran, Golden Gate, and Orpheum Theaters and that, during the 12-month period ending April 30, 2002, SHN, in concluding its business operations described above, purchased goods, materials, and supplies, valued in excess of &50,000, directly from suppliers located outside the State of California. Respondent further admits that SHN is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Also, Respondent admits that the American Musical Theater of San Jose (AMTSJ), a corporation with an office and place of business in San Jose, California, has been engaged in the business of operating a theater for the production of live performances and that, during the 12-month period ending April 30, 2002, AMTSJ, in concluding

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[2] General Counsel's Exhibit No. 9 is a page from McDuffie's handwritten notes, which she transcribed while viewing Respondent's dispatch hall records on April 5, 1999. On the first day of the hearing, counsel for the General Counsel offered the above exhibit to establish the dates in January 1999 on which three individuals— Bill McGlone, Mark Saladino, and Alexis Vasquez-- telephoned Respondent in order to have their names placed on its out-of-work roster. Inasmuch as counsel conceded the document was being offered to establish the truth of what was written on the document, I rejected it. Subsequently, counsel offered the same document as an alleged prior consistent statement, ostensibly corroborating McDuffie regarding three matters about which she testified. Having considered counsel's offer, I shall receive General Counsel's Exhibit No. 9 for the limited purpose stated by counsel and for no other purpose. Whatever weight I give to the document shall be discussed infra.

In addition, at the hearing, I conditionally received General Counsel's Exhibits Nos. 19(a), (b), and (c)—a position statement from counsel for Respondent, dated April 5, 2000, and related documents. The position statement was submitted during the General Counsel's investigation of the instant matter, and I conditionally received it in order to ascertain whether, in fact, the position statement contained potential admissions. While, at the hearing, Respondent offered no testimonial or documentary evidence in defending against the allegations of the second amended complaint— indeed, failing to offer any explanations, at all, for its actions herein, counsel for Respondent's position statement contains factual explanations for his client's failure to give the referrals, at issue herein, to McDuffie. While arguing vociferously against admission, counsel for Respondent never disavowed the content of his April 5, 2000 letter. In my view, counsel's statements, in his letter, arguably constitute factual admissions, regarding matters contrary to Respondent's legal interests herein, and their substance is clearly relevant to the unfair labor practice issues involved herein. As it is the Board's policy to receive proffered position statements of parties if relevant, I reaffirm receipt of General Counsel's Exhibit No.19(a), (b), and (c). Massillon Community Hospital, 282 NLRB 675 at 675 n. 5 (1987).

its business operations described above, purchased goods, materials, and supplies, valued in excess of &50,000, directly from suppliers located outside the State of California. Respondent further admits that AMTSJ is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admits that it is a labor organization within the meaning of Section 2(5) of the Act.

III. The Issues

The second amended complaint alleges that Respondent engaged in acts and conduct, violative of Sections 8(b)(1)(A) and 8(b)(2) of the Act by, on or about February 8, 1999, failing and refusing to refer McDuffie to employment with SHN at the Orpheum Theater on the production of *Evita* and, instead, referring Alexis Vasquez; by, on or about March 2, 1999, failing and refusing to refer McDuffie to employment with SHN at the Golden Gate Theater on the production of *Rent* and, instead, referring Bill McGlone; by, on or about March 8, 1999, failing and refusing to refer McDuffie to employment with AMTSJ on the production of *Big River* and, instead, referring Forrest Dobbs; and by, in October, 1999, failing and refusing to refer McDuffie to employment with SHN on the production of *Sunset Blvd.*, and, instead, referring Bill McGlone and Karrin Kain. The second amended complaint further alleges that Respondent engaged in acts and conduct, violative of Section 8(b)(1)(A) of the Act., by denying McDuffie's request to photocopy hiring hall records. As set forth above, Respondent denied the commission of the alleged unfair labor practices.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Respondent represents individuals, who perform wardrobe work for employers engaged in the production of live theatrical performances, operas, ballets, and stadium shows in the San Francisco Bay area.[3] Among the numerous San Francisco Bay area employers, with whom Respondent had existing collective-bargaining agreements in 1999, were SHN, which owns and operates the Curran, Golden Gate, and Shubert Theaters in San Francisco, California, and AMTSJ, which operates a theater for live performances in San Jose, California. The Charging Party, Odessa McDuffie, has been a member of Respondent for over 20 years and has worked as a dresser for "practically any kind of theatrical performance . . . ."[4] At all times material

[3] Wardrobe work includes the work of dressing performers prior to and during performances, seamstress work, and laundry work. Depending upon the type of work, employees, who perform wardrobe work, may be required to have special skills, such as the ability to do tailoring and alterations, and to possess equipment, such as irons, steamers, and sewing machines.

[4] According to McDuffie, a dresser is ". . . basically the custodian of the costumes. We take care of the costumes, we make sure that they're maintained and cleaned, and we do the inventory. . . . And we preset them for quick changes and we help the performers . . . get into their costumes in time and make sure everybody has on the right thing when they go on stage."

herein, Anne Polland was the business agent for Respondent,[5] and Tomianne Wiley was its secretary.

Directly at issue herein is whether Respondent has exclusive hiring hall arrangements with SHN and AMTSJ. In this regard, paragraph A of Respondent's collective-bargaining agreement with AMTSJ, effective from October 17, 1998 through October 16, 2003, which, the General Counsel contends, establishes an exclusive hiring hall, reads as follows:

> The Employment by AMTSJ of at least two dressers from Local 784 for the 1998-1999 and 1999-2000 seasons and every year thereafter the employment by AMTSJ of at least three dressers from Local 784, all persons to be mutually agreed upon by both AMTSJ and Local 784 and utilized by AMTSJ as Principle and Key Dressers.

While no such provision appears in the collective-bargaining agreement between Respondent and SHN, effective from November 28, 1996 through November 27, 1999, the General Counsel contends that the parties "maintained an arrangement," requiring that Respondent be the exclusive source of referral of wardrobe employees for employment on productions at SHN-owned theaters and that the existing referral procedure is, in effect, an exclusive one. Thus, the second paragraph of the "coverage" provision states, "The Employer agrees to notify the Union when its [sic] seeking employees." The record establishes that while, in practice, SHN is the employer of the front of house staff (such as box office employees, ushers, and ticket takers) and the backstage staff (such as stage hands, lighting employees, and wardrobe employees), who are working at its theaters, it does not precipitate the hiring process for the employees represented by Respondent. Rather, traveling production companies, which employ the actors who travel with the show, contract with SHN for use of the latter's theaters to put on their shows. Before the traveling production arrives in San Francisco, the production company sends a "white card" to Respondent, setting forth the number of wardrobe employees, who will be

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[5] While conceding that Polland was its business agent, Respondent denied that she was its agent within the meaning of Section 2(13) of the Act. According to Respondent's constitution and by-laws, the business agent, which is a elected position, is responsible for operation of Respondent's dispatch hall, which encompasses maintaining the out-of-work roster, referring individuals to jobs with signatory employers, and keeping a record of all work given out, representing Respondent in all dealings with employers, and investigating all contractual disputes. In addition, the business agent assigns and oversees the duties of the assistant business agent and appoints stewards for each job. With regard to dealing with employers, Anne Polland appears to have signed the existing collective-bargaining agreements with SHN and AMTSJ on behalf of Respondent. As noted by counsel for the General Counsel, the Board applies the common law rules of agency in determining whether individuals act as agents within the meaning of the Act. Southern Bag Corp., 315 NLRB 725 at 725 (1994); Service Employees Local 87 (West Bay Maintenance), 291 NLRB 82 at 82 (1988). An alleged agent's authority may be actual or apparent, and, as noted by the Board, ". . . actual authority refers to the power of an agent to act on his principal's behalf when that power is created by the principal's manifestation of power to him." Communications Workers Local 9431 (Pacific Bell), 304 NLRB 446 at 446 n. 4 (1991). Herein, Respondent's constitution expressly authorized Polland, as business agent, to operate Respondent's dispatch hall on its behalf and to negotiate and to execute collective-bargaining agreements on behalf of Respondent. Therefore, at least as to her actions in these regards, I believe that Polland, who was business agent from 1991 until her death, was Respondent's agent within the meaning of Section 2(13) of the Act.

required for its show, and the dates the production will be play at the SHN-owned theater. When it obtains this information, Respondent sends the specified number of wardrobe employees to the proper SHN-owned theater on the date that the production begins or is being loaded in. Significantly, SHN theater managers hire the individuals, who have been dispatched by Respondent, without interviewing them and have never refused to hire a wardrobe employee, who has been referred to it by Respondent,[6] and the wardrobe employees, hired by SHN, are always individuals, who have been referred by Respondent. The record further establishes that, when Respondent has not received the requisite notice for wardrobe employees from the traveling production company, its business agent has telephoned an SHN theater manager with regard to how to contact the traveling production company. Moreover, neither SHN nor the traveling production companies advertises wardrobe vacancies for shows, which will be produced at the former's theaters, and they do not utilize employment agencies to fill vacant wardrobe employee positions. Also, once a wardrobe crew is working on a production at a SHN-owned theater, if a wardrobe employee is ill or needs to take a day off, SHN telephones Respondent in order to request a replacement. Finally, SHN regularly employs the same individuals as wardrobe house heads during productions at each of its theaters--[7] Anne Jones at the Curran Theater, Ruth Lepiane at the Orpheum Theater, and Karrin Kain at the Golden Gate Theater. With regard to Anne Jones, Odessa McDuffie testified that, while reviewing Respondent's hiring hall books and records on April 5, she found a by-name request for Jones to work on a play from the manager of the Curran Theater.

Concerning Respondent's referral procedures, there is no dispute that these are governed by its constitution and by-laws and that, as Respondent's business agent at all times material herein, Anne Polland[8] was the official responsible for referring individuals to jobs with

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[6] The wardrobe employees are hired by SHN just for the duration of the show.

[7] Although not entirely clear in the record, house heads apparently have a dual role at a theater, concurrently acting as lead persons for SHN and shop stewards for Respondent.

[8] During the hearing, counsel for the General Counsel offered into the record General Counsel's Exhibit Nos. 9(a) through (e), which are the transcripts and exhibits from a deposition given by Anne Polland in Case 20-CB-9962, an unfair labor practice charge filed by McDuffie against Respondent on May 8, 1995. The deposition, which was taken over a four-day period (October 20, 1999 and July 27, September 14, and September 26, 2000), concerns several allegations in that matter, about which Polland answered questions, including the operation of Respondent's referral system for employees to theatrical employers. During the taking of the deposition, counsel for Respondent vigorously represented his client, objecting to questions and directing Polland not to answer questions, which he deemed improper. Counsel then objected to my receipt of the deposition on hearsay grounds, and I gave the parties an opportunity to brief the issue to me. Contrary to counsel for Respondent, Counsel for the General Counsel argued that the deposition should be received as either the admission of a party opponent pursuant to Federal Rules of Evidence Section 801(d)(2)(D) or, since Polland unfortunately died prior to the hearing, as the former testimony of an unavailable declarant pursuant to Federal Rules of Evidence Section 804(a)(4). Having considered the briefs, which shall be made part of the record, I stated that, as I had not yet decided whether Polland was an agent of Respondent and as I required time to consider whether what Polland said, during the deposition, in fact, constituted admissions, I would conditionally receive the deposition subject to further ruling. I have ruled above that Polland acted as Respondent's agent in managing its referral hall. Moreover, Polland testified extensively regarding Respondent's referral procedure for employees to theatrical employers, which is identical to the issue involved herein, and, while the

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signatory employers. In this regard, the record[9] reveals that individuals, who desire to be referred to jobs from Respondent's dispatch hall, fill out skill sheets on which they specify any special skills, including performing sewing for tailoring and alterations, any equipment (irons, ironing board, steamer, etc.) owned, hours willing to work, ownership of a car and availability to travel outside of San Francisco, and access to public transportation. For referrals to jobs, Respondent maintains an out-of-work referral board, which is kept at Respondent's office in San Francisco and is, in fact, a magnetic board with the dispatch applicants' names on magnetic strips.[10] Pursuant to the job roster procedures, which are set forth on page 45 of Respondent's constitution and by-laws, at the conclusion of a job, a job applicant must telephone a work availability telephone number, and, after the applicant gives his/her name and work availability information,[11] the applicant's name will be placed at the bottom of the list of names on the out-of-work roster. Then, "in order to retain [his/her] position on the out-of-work list," on the 15th, 16th, or 17th of that month and each month thereafter until, the applicant must call the dispatch hall and restate his/her availability for dispatch. If the applicant fails to do so, his or her name is removed from the list, and, if the applicant calls in again, his/her name will be placed on the bottom of the list. Subsequently, when the business agent telephones an applicant with a referral, if the job is scheduled to last 16 or more hours and after the applicant has worked said number of hours, his/her name will be moved to the bottom of the out-of-work roster; however, if the job is scheduled to last fewer than 16 hours and is accepted by the applicant, he/she retains his position on the out-of-work roster. Further, if an applicant refuses a referral, is away for more than 24 hours and fails to notify Respondent's office, or goes on vacation and, consequently, is unable to accept calls when his/her name comes to the top of the list, his or her name goes to the end of the out-of-work roster. However, if an applicant is unable to accept a referral because of illness, he/she may retain his or her position on the list by notifying Respondent's office. Finally, in these regards, based upon his or her job skills, a hiring hall applicant may specify the type of job to which he or she is available for referral.

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prior matter involved Respondent's referral procedure during the mid-1990's, she conceded the dispatch system basically remained unchanged through 2000. Thus, the identical parties and issue are involved in both matters. Therefore, I believe, and find, that whatever Polland said, regarding the operation of Respondent's referral procedure and related matters, was not hearsay but, rather, constituted admissions of a party-opponent. On this point, I deem what Polland said as admissions because her statements were contrary to Respondent's legal interests herein. Moreover, while Polland was deceased at the time of the trial and her deposition should be "evaluated with maximum caution" (United Sanitation Services, 262 NLRB 1369, 1374 (1982), given Respondent's attorney's presence during the entire deposition, I believe Polland answered questions in a truthful manner. Therefore, I shall receive Polland's deposition in Case 20-CB-9962 as admissions by a party-opponent. Fredericksburg Glass and Mirror, Inc., 323 NLRB 165, 176 (1997)' Croley Coal Corporation, 280 NLRB 899 at 899 n. 2 (1986). Finally, I grant counsel for the General Counsel's request that counsels' briefs on these points be made part of the instant record.

[9] Given that Respondent failed to present any evidence in its behalf at the hearing and that the issues are critical to the allegations herein, I believe that everything about which Polland testified during her deposition regarding the operation of Respondent's hiring hall, constituted admissions. Moreover, I note that Polland, during her deposition, and McDuffie, during the trial, for the most part, corroborated each other.

[10] There are usually between 60 and 70 names on the list during slow periods.

[11] The applicant must specify whether he/she is available for full time or part time work.

The central issue as to Respondent's referral procedures is whether the process is a first in-first out referral process. In this regard, on page 46 of Respondent's constitution and by-laws are its so-called job roster procedures, which the business agent applies "as appropriate" when assigning work. These include the date the applicant last worked, how the applicant's skills match the requirements of the employer, the special needs of the employer, the special equipment required for the job, the ability of the office to contact the applicant, the quick confirmation of the applicant's willingness to accept the referral, the applicant's employment history, whether the applicant has other work which might conflict with the schedule of the job being assigned, and, as applicable, the applicant's work experience.[12] Notwithstanding the foregoing, counsel for the General Counsel contends that Respondent's dispatch procedure is basically a first in-first out one and points to the testimony of McDuffie and certain asserted admissions by Polland in her deposition. Thus, when asked about the job roster, McDuffie responded, "That is a roster where officially we're supposed to be called . . . on a first in, first out basis . . . ."[13] As to Polland's alleged admissions, when asked ". . . presumably the names would continue climbing higher and higher toward the top of the list and then dispatches would be made off the top of the list . . . ," Polland replied, "Yes." Later, after stating that an applicant's skills and available equipment are factors, which she considered for dispatching to theatrical employers, when asked if the areas she considers for referral to a theatrical employer are the requirements of the employer and "who's uppermost on the board . . . ," Polland replied, "Right." Then, with regard to "by name" requests by employers, after stating Respondent's "policy is that if they do request names I thank them for thinking so highly of some of our workers. And tell them that we do have a system in place. And if it's possible within our system I would be glad to honor who they think so highly of,"[14] when asked ". . . if you can't honor a name request because the individual is unavailable, how do you fill that employer's request, Polland answered, "I go right down the list." While denying that her review of Respondent's dispatch hall records disclosed any requests for employees based on gender, McDuffie testified that she noticed requests for bilingual, Spanish-speaking employees and for employees who owned steamers and ironing boards. Finally, specifically with regard to McDuffie, while when she telephoned Respondent's office in January and February to place her name on Respondent's out-of-work roster and to maintain her position, she said only ". . . I was available for work," there is no record evidence that she placed any time or geographical limitations upon her availability for job referrals. Moreover, she was uncontroverted that the only limitation, which she noted on her skill sheet, was her unwillingness to travel outside the San Francisco Bay

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[12] There is no record evidence that these factors are ranked in any order of importance.

[13] While responding to a question by me, McDuffie conceded that nowhere in Respondent's constitution and by-laws is it "specifically" mandated that the dispatch procedure be operated on a first in-first out basis. Further, she conceded, "You would call in, you'd put your name on the list and when your name came up you would be called according to your particular skills and if you're able to do the work."

[14] McDuffie testified that, while not specified on page 46 of Respondent's constitution and by-laws as a basis for dispatch, her review of Respondent's dispatch hall books and records on April 5 disclosed, at least, three by-name requests, including one for Anne Jones as the househead at the Curran Theater and several for the San Francisco Opera, which traditionally uses the same employees year after year. During cross-examination, while first stating that an employer can call by name for an applicant and the individual will be dispatched no matter what the person's position on the out-of-work roster, she subsequently denied knowing that employees are requested by name.

area. Otherwise, she indicated her ability to perform any work required of a job applicant and her possession of all requisite equipment— steamer, iron, ironing board, and sewing machine.

Unlike most job applicants, who utilize Respondent's dispatch hall, McDuffie, who has been a journeyman in the wardrobe field, primarily as a dresser, since 1985 and a member of Respondent since 1981, was continuously employed for most of the time period from 1990 through January 1999.[15] Thus, she worked on *Phantom of the Opera*, the longest running theatrical production in Respondent's history, from 1993 until January 3, 1999,[16] and, prior to that show, she worked on the productions of *Cats* for approximately seven months and *Les Miserables for 14* months. *Phantom of the Opera* completed its run on January 3, and, that night, after the "closing party," she called the telephone number for Respondent's dispatch hall in order to place her name on the out-of-work roster. McDuffie testified that, after the answering machine, which automatically records the date and time of each incoming telephone call, began recording, she stated her name and her availability for work. However, because she had forgotten the procedure and necessity for telephoning the dispatch hall on either the 15th, 16th, or 17th in order to retain her position on the out-of-work roster, McDuffie did not again telephone the dispatch hall until January 20 at which time, presumably, her name was placed on the bottom of the job roster.[17] McDuffie averred that she did remember to telephone the dispatch office between February 15 and 17 in order to retain her position on the roster.[18] Thereafter, "during the first two or three days of March," Anne Polland telephoned her and offered her a two or three day job, which was to start that night, with the *Disney on Ice* ice show. McDuffie informed Polland that she was scheduled to have "a little sty taken off [her] eye" later in the day and that she would be "fine" to work that night. Polland then ". . . suggested that I not take that job but take the next job. But, my name would remain on the list." Later in the month, Polland again telephoned McDuffie about a possible job referral to a job at the Zellerbach Theater for the Mark Morris dance troupe—"She told me the beginning and end date, and it was about four days." The Charging Party accepted this referral, began working on or about March 17, and worked until March 21.

Notwithstanding the above job referrals, McDuffie was convinced that Polland had been deliberately and unlawfully bypassing her for available jobs. According to McDuffie, having read newspaper stories and advertisements for the opening of a new show and spoken to other members of Respondent about possible jobs prior to Polland's telephone call about the *Disney on Ice* job, ". . . there was also another job which I had reason to believe I should have gotten, which lasted a lot longer, and I actually wanted to know why I wasn't called for that job, rather than just this two or three day job." Therefore, believing she should have been "in line" for this

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[15] According to McDuffie, most job referrals are for shows, which last for two or three days. Referrals for the seasons of the San Francisco Opera and the San Francisco Ballet last for three or four months. Referrals to these are usually by name and go to the same individuals year after year.

[16] McDuffie was one of 18 individuals, including William McGlone, who were dispatched from Respondent's dispatch hall and worked on *Phantom of the Opera* for the entire run of the show, which was presented at SHN's Curran Theater. McDuffie earned in excess of $30,000 a year for her wardrobe work on this show.

[17] McDuffie admitted that she had no knowledge as to how many people were above her on the out-of-work roster.

[18] I note that McDuffie volunteered this fact gratuitously during cross-examination and not in response to a specific question.

other job, a few days after Polland advised her not to accept the ice show referral, McDuffie submitted, by fax, a document, dated March 9, to Tomianne Wiley, Respondent's elected secretary, in which she wrote, "I would like to request an appointment to come in within the next two weeks to see records of all work dispatched by [Respondent] over the last six months." Besides seeing the newspaper stories and her conversations with other wardrobe workers, McDuffie's belief that she was being bypassed for available jobs was annealed by a conversation with Respondent's office secretary, Susan Chriswell,[19] on the same day Polland offered her the *Mark Morris* job. According to McDuffie, Chriswell informed her that the two names at the top of the out-of-work roster were hers and Joan Morrison, and "she was actually above me."

Eventually, Wiley scheduled an appointment for McDuffie to come to Respondent's office on April 5 and review the dispatch hall job referral and dispatch records. There is no dispute that, as scheduled, McDuffie appeared at Respondent's office on April 5 and spent between two and three hours examining its dispatch records. Wiley and Charles Hoffman, a vice-president of Respondent were present while the Charging Party viewed the records. As to what records she viewed, according to McDuffie, "I was shown the phone records, which are records of those phone calls that we made into the union . . . . I was shown these white forms that Ms. Polland was using to keep . . . a record of who called her and who was dispatched to various jobs. I was shown . . . white cards which showed . . . the list of names that were on specific jobs. And also,. . . I was shown the notifications from the various shows that were coming to town." During cross-examination, she added that she saw white 3x5 cards on which Polland wrote lists of names, "saying who is what show" and 8½x11 preprinted forms, which contained information pertaining to the date an employer requested the dispatch of employees, the number of employees to be referred, any special skills or equipment necessary for the job, the names and dispatch dates of those employees who were referred to the job, and whether any individuals refused the referral. McDuffie testified that, upon being shown the documents, "I asked Tomianne if I could make . . . photocopies. . . . She said . . . on advice of her attorney that I was not allowed to copy them."[20] That Wiley, who was seriously ill with cancer and unable to

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[19] Counsel for Respondent denied that Chriswell was Respondent's agent and, of course, that she could bind his client by anything she said. Other than that she answered telephone calls to Respondent's business office, there is scant, if any, evidence in the record as to Chriswell's job duties. However, during her deposition, questioned as to whether job applicants had any knowledge as to their positions on the out-of-work roster, Polland admitted "they could always come by the office and look or call and find out where their positions were." Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. Southern Bag Corp., supra at 725. The test is ". . . whether under all the circumstances, the employees `would reasonably believe that the employee in question (the alleged agent) was reflecting company policy and speaking and acting for management.'" Great American Products, 312 NLRB 962, 963 (1993). I believe Chriswell was Respondent's agent for the limited purpose of giving callers information relating to their positions on the out-of-work list. Thus, Respondent placed Chriswell in a position to answer telephone inquiries from members regarding their positions on the job roster and, in said circumstances, I believe, callers could rely upon the information, related to them by Chriswell, regarding their positions on the list. GM Electrics, 323 NLRB 125, 125-6 (1997); Grimmway Farms, 314 NLRB 73, 74 at n. 6 and 88 at n. 25 (1994).

[20] As to whether Wiley was acting as Respondent's agent in denying McDuffie the opportunity to photocopy dispatch records, Respondent's constitution and by-laws gives

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testify at the trial, correctly stated Respondent's policy is clear as, during her deposition when asked if employees, who come to the office to examine the dispatch hall's records, are permitted to make photocopies, Polland admitted, "They have not been;" rather, they must take notes. Given Wiley's refusal of her request, McDuffie was forced to take notes of what she saw in the records.

McDuffie testified that her view of the dispatch hall records revealed the following information. Her view of Respondent's telephone records disclosed that she registered on the out-of-work roster as of January 20 and that three individuals—Mark Saladino, Alexis Vasquez, and William McGlone[21]-- telephoned the dispatch hall and registered after her in January.[22] With regard to Saladino and Vasquez, during direct examination, the Charging Party testified that the dispatch hall records disclosed that they were referred to the play *Evita* on or about March 3 and, during cross-examination, that the referrals were in mid-February.[23] While there is no exact record evidence on the dates of dispatch of either person, the parties did stipulate that Mark Saladino and Alexandra Vasquez were employed by SHN as wardrobe employees on the production of *Evita* at the Orpheum Theater from February 17 through March 14, 1999. Concerning McGlone, McDuffie testified that the dispatch records revealed that he was referred to the play *Rent* in mid-March. While there is no record evidence as when he was dispatched,[24] the parties did stipulate that William McGlone was employed by SHN as a wardrobe employee on the production of *Rent* at the Golden Gate Theater from March 3 through September 7. Next, McDuffie viewed the dispatch hall records for individuals, who were dispatched to the AMTSJ production of a play, *Big River*, in early March. According to her, notwithstanding Polland's assurance that she would not lose her place on the out-of-work list for being unable to accept the *Disney On Ice* referral, she discovered that two individuals, Forrest Dobbs[25] and one other applicant, had been dispatched for wardrobe work on that play on "approximately" March 8. In this regard, the parties stipulated that Dobbs was employed as a wardrobe employee on the AMTSJ production of *Big River* from March 8 through March 28.

Respondent's secretary, which is an elected position, responsibility for managing its office. Clearly, it was in this capacity that Wiley arranged for McDuffie's appointment to view the dispatch hall records, and she was present while the Charging Party did so. Herein, Respondent placed Wiley in a position in which users of the dispatch hall would look to her as an authoritative communicator of information on behalf of Respondent, particularly in matters of office policy. In these circumstances, I believe she acted as Respondent's agent within the meaning of Section 2(13) of the Act.

21 McGlone is Respondent's elected president.

22 While McDuffie contradicted herself as to the dates on which Saladino, Vasquez, and McGlone registered on the out-of-work list, her testimony, her testimony, that each registered on the list after her in January, was corroborated by General Counsel's Exhibit No. 9 and uncontroverted by Respondent.

23 McDuffie later conceded that, while the records established that Vasquez was dispatched to *Evita*, she could not recall the date on the hiring hall documents.

24 There is record evidence to establish that McGlone's dispatch was on or about February 23. Thus, McDuffie did recall viewing records showing that an individual, Brian Metzler, refused a dispatch to *Rent* on February 23. On this latter point, I note that McDuffie initially testified that Metzler had refused a dispatch to *Evita*.

25 Dobbs is a vice-president of Respondent.

McDuffie further testified that, during August, she worked for four weeks as a wardrobe employee on the play, *Jekyll and Hyde*, which closed on August 29[26] and that she immediately telephoned the dispatch hall, leaving a message to place her name on the out-of-work roster. Presentation of the play, *Sunset Blvd.*, at SHN's Curran Theater began in October 1999, and McDuffie asserts that she must have been bypassed on the out-of-work roster for wardrobe work on that production in favor of William McGlone and another individual, Karrin Kain, "Specifically, Karrin Kain and Bill McGlone were still on *Rent* . . . when I got off from *Jekyll and Hyde*, so that job lasted past the time I went back on the list . . . ."[27] According to McDuffie, she knew when *Rent* closed from reading the newspapers, and she believed Kain and McGlone stayed with that production until closing as "no one else was called in to take their place." On these points, while there is no record evidence as to their dispatch dates, the parties stipulated that McGlone and Kain[28] worked on the production of *Rent*, at least, until September 7 and that each worked for SHN as a wardrobe employee on the production of *Sunset Blvd.* At the Curran Theater from October 12 through November 11.[29]

Counsel for the General Counsel and McDuffie assert that Respondent arbitrarily, capriciously, and discriminatorily bypassed the Charging Party for the above four job referrals as retribution against the latter for past protected concerted activities against Respondent's interests and those of its leadership in which she engaged. Thus, while she was working on *Phantom of the Opera*, McDuffie filed two unfair labor practice charges with the Board against Respondent-- the first, Case 20-CB-9962 filed on May 8 1995, alleged that Respondent unlawfully required its shop stewards to reprimand certain employee-members, operated its dispatch hall in a discriminatory manner, threatened employees for exercising contractual rights, condoned violations of contractual rights by its officers and others, failing and refusing to represent employee-members regarding contract disputes with management, and retaliating against McDuffie because she protested against certain of Respondent's acts and conduct and the second, Case 20-CB-10693 filed on December 12, 1997, alleged that Respondent unlawfully failed and refused to represent McDuffie in the filing of a contractual grievance. After

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[26] Polland telephoned her with the referral.

[27] Notwithstanding that McDuffie telephoned the dispatch hall number immediately after the conclusion of her job with *Jekyll and Hyde* in order to have her name placed on the out-of-work roster and that, a week so later, she heard from an office secretary that Karrin Kain was below her on the out-of-work list, there is no record evidence that she maintained her position on said roster by telephoning the dispatch hall between September 15 and 17.

[28] Kain is a vice-president of Respondent.

[29] I view statements in Counsel for Respondent's position letter, dated April 5, 2000, as corroboration that McDuffie was bypassed for three of the referrals at issue herein. Thus, his answers, 2(a) and 2(b) are explanations as to why Saladino and Vasquez were dispatched to *Evita* instead of McDuffie; his answer 2(e) is an explanation as to why McGlone was dispatched to *Rent* ahead of McDuffie; and his answer 2(h) is an explanation as to why Dobbs was dispatched to *Big River* instead of McDuffie. However, as these are explanations for Respondent's conceded conduct, I do not view the attorney's statements as admissions. Moreover, I shall consider these explanations as possible defenses for the alleged unfair labor practices. In this regard, I note that counsel failed to offer any corroboration, including, presumably, Respondent's dispatch hall records, upon which they must have been based, for his statements.

investigations,[30] both unfair labor practice charges were eventually dismissed. Also, McDuffie filed two actions, one on July 18, 1997 and the other on August 19, 1999, against Respondent with the Equal Employment Opportunities Commission. In addition to these legal actions, while working on *Phantom of the Opera*, in 1993, she sent a letter to Respondent's executive board, expressing her view that house head and the shop steward at theaters was usually the same individual, which letter resulted in her being summoned to appear before the executive board to answer charges of slandering a fellow member of Respondent; in 1997, McDuffie circulated a petition, proposing to Respondent's executive board that it change the labor organization's dispatch procedures, amongst Respondent's members;[31] and, in 1998, she was a candidate fir the office of business agent against Polland.[32] She was subsequently exonerated of the slander allegation, her petition was eventually voted down by a majority of the members present at a membership meeting, and Polland defeated her in the election for business agent

B. Legal Analysis

Initially, the General Counsel alleges, and Respondent denies that, at all times material herein, its hiring hall arrangements with AMTSJ and SHN constituted exclusive dispatching relationships. Court and Board law in this regard is clear, unambiguous, and not in dispute. Thus, an exclusive hiring hall relationship exists when a union operates as the sole source of all, or a specified number or percentage, of the employees for an employer. Iron Workers Local 118 (California Erectors), 309 NLRB 808, 811 (1992), overruled on other grounds 329 NLRB 688 (1999); Carpenters Local 608(Various Employers), 279 NLRB 747, 754 (1986); Operating Engineers Local 406 (Ford, Bacon & Davis Construction Corp., 262 NLRB 50, 57 (1982). Such a relationship may be established in the parties' collective-bargaining agreement, by the past practice of the parties, by the "uniformity in the course of conduct followed by" the parties; and by the parties' "consistent practice." Iron Workers Local 118, supra; Teamsters Local Union No. 174 (Totem Beverages), 226 NLRB 690, 691 (1976); Local No. 96, Sheet Metal Workers (Roland M. Cotton, Inc.), 222 NLRB 756, 758 (1976); Chicago Lithographer Local No. 245 (Alden Press, Inc.), 196 NLRB 720, 721 (1972); Iron Workers Local No. 10 (Guy F. Atkinson Co.), 196 NLRB 712, 714 (1972).[33] In establishing an exclusive hiring hall arrangement by past practice, it is not enough that the record evidence demonstrates the employer's consistent

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[30] During the investigation of Case 21-CB-9962, the General Counsel issued an investigatory subpoena to Polland in order to obtain her testimony. She refused to comply, and the General Counsel sought compliance from a Federal district court judge. The deposition, at issue herein, was the result.

[31] McDuffie and her supporters wanted to drastically change the method by which the out-of-work list was operated. She testified that her petition would have had dispatch hall applicants in three seniority groups so ". . . that those who had the most seniority always got the first shot at calls. The first seniority group would have been for those with eight or more years of work within the jurisdiction of Respondent, and she would have been in that group.

[32] During cross-examination, McDuffie testified that, notwithstanding her position in her petition campaign, during the election campaign, her position was that dispatches be done fairly on a first in-first out basis. She took this position because she believed Polland ran the dispatch hall on a much too "subjective" basis—"I understood how referrals were supposed to be made, but I never understood what she was doing."

[33] An exclusive hiring hall relationship may exist where the employer is required to obtain the approval of the labor organization in order to hire a job applicant, who has not been referred by the latter. Local No. 96, supra.

practice of hiring referrals from the labor organization. Rather, the record evidence must establish that the labor organization knowingly participated in the referral process. Iron Workers Local No. 10, supra.

Having considered the record as a whole, I agree with counsel for the General Counsel that Respondent's collective-bargaining agreement with AMTSJ establishes an exclusive hiring hall relationship and that their past practice in hiring wardrobe employees likewise establishes an exclusive hiring relationship between SHN and Respondent. With regard to the former, the parties' agreement mandates that AMTSJ hire a minimum of two or three dressers from Respondent with said employees to be "mutually agreed upon." The significance of the contract provision is clear. First, the contractual language is "mandatory" with regard to the source of the theatrical company's employees— Respondent. Carpenters Local 608, supra; Bricklayers Local 8 (California Conference of Mason Contractors Assns.), 235 NLRB 1001, 1003 (1978). Further, the term, "mutually agreed upon," obviously requires Respondent's assent prior to the hiring of any dressers by AMTSJ. In these circumstances, an exclusive hiring hall arrangement, by contract, clearly exists between the latter and Respondent. Iron Workers Local 118, supra; Carpenters Local 608, supra; Bricklayers Local 608, supra. Regarding Respondent and SHN, the record clearly establishes that, at all times material herein, the latter has looked upon Respondent as the exclusive source of all wardrobe employees, who are employed on theatrical performances at its theaters. Thus, for productions at the SHN theaters, while SHN is the employer, traveling production companies always inform Respondent as to the number and types of wardrobe employees required for the show; Respondent then dispatches the specified number of wardrobe employees to the SHN-owned theater for the show and SHN hires the individuals without interviewing them; and SHN only utilizes wardrobe employees, who have been dispatched by Respondent and has never refused to hire anyone who has been dispatched from Respondent's hiring hall. Further, neither SHN nor the traveling production companies advertise for wardrobe employees or utilize employment agencies for such employees; SHN theater managers notify Respondent for a replacement if a wardrobe employee is off from work for any reason; and SHN regularly employs the same wardrobe employees as house heads during productions at its theaters after, apparently, requesting them by name from Respondent. From the foregoing, it is clear that traveling production companies and SHN consistently and uniformly utilize Respondent as the source for wardrobe employees for the shows, and SHN never uses any other source for wardrobe employees. In my view, this uniform past practice clearly establishes an exclusive referral relationship between SHN and Respondent. Local No. 96, Sheet Metal Workers, supra; Iron Workers Local 10, supra.

The crux of the allegations of the second amended complaint is whether Respondent breached its duty of fair representation to McDuffie by engaging in unfair labor practices, violative of Sections 8(b)(1)(A) and 8(b)(2) of the Act, by bypassing the Charging Party for dispatch on four separate occasions. In this regard, in Ford Motor Co. v. Hoffman, 342 NLRB 192, 204 (1953), the Supreme Court held that a labor organization's authority as the exclusive bargaining representative necessitates a duty to represent all bargaining unit employees fairly, and, in Miranda Fuel Co., 140 NLRB 181, 185-86 (1962), enf. denied 326 F.2d 172 (2nd Cir. 1963), the Board held that a union's breach of its duty of fair representation constitutes an unfair labor practice violative of Section 8(b)(1)(A) of the Act when it acts against any employee for considerations which are irrelevant, invidious, or unfair and of Section 8(b)(2) of the Act when, for arbitrary, invidious, or discriminatory reasons, it attempts to cause, or causes, an employer to derogate the employment status of an employee. Since these two cases, the Court, Federal courts of appeals, and the Board have consistently held that a labor organization, which operates an exclusive hiring hall, owes this duty of fair representation to all job applicants who utilize the hiring hall. Air Line Pilots Assn v. O'Neill, 499 U.S. 65, 77 (1991); Breininger v. Sheet Metal Workers Assn. Local Union No. 6, 493 U.S. 67, 75 at n. 3 (1989); Boilermakers

Local 374 v. NLRB, 852 F.2d 1353, 1358 (D.C.Cir. 1988); Operating Engineers Local 406 v. NLRB, 701 F.2d 504, 508 (5th Cir. 1983); Boilermakers Local 374 (Construction Engineering), 284 NLRB 1382, 1383 (1987); Teamsters Local 519 (Rust Engineering), 276 NLRB 898, 908 (1985). Basically, a labor organization, which operates an exclusive hiring hall must not engage in ". . . deliberate conduct that is intended to harm or disadvantage applicants." Plumbers Local 342 (Contra Costa Electric), 336 NLRB No. 44 at slip. op. 3 (2001). Further, such misconduct is violative of Sections 8(b)(1)(A) and 8(b)(2) of the Act ". . . unless the union can demonstrate that the departure was pursuant to a valid union security clause or was necessary to the union's effective performance of its representative function." Id. at slip. op. 2. Finally, "a union's simple negligence in administrating a hiring hall does not implicate the concerns that animate the duty of fair representation." Id. at sllp. op. 4.

The parties recognize, and I concur, that whether counsel for the General Counsel has established a *prima facie* case that Respondent breached its duty of fair representation owed to all users of its dispatch hall and of hiring hall discrimination against Odessa McDuffie is wholly dependent upon the credibility of the Charging Party. Bluntly put, her testimony is the only record evidence pertaining to the contents of Respondent's hiring hall records, upon which the General Counsel is relying, the authenticity and accuracy of the notes which she assertedly made from said records, and any oral communications between herself and agents of Respondent.[34] Having viewed McDuffie's testimonial demeanor for a day and a half, she did not appear, to me, as being a particularly impressive witness. Her memory of events, conversations, and the content of documents was nonexistent at times and often had to be refreshed or bypassed by the evidentiary device of past recollection recorded. Moreover, she was argumentative and evasive on occasion and inconsistent on several points. In these circumstances, I should be reluctant to give considerable weight to her testimony. However, McDuffie's demeanor, while testifying, was not that of a disingenuous or wholly incredible witness, and significant aspects her testimony were corroborated by her handwritten notes of what she observed in Respondent's dispatch hall records,[35] and her entire testimony was

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[34] Arguing that the best evidence of the contents of Respondent's hiring hall records are the records themselves and that the General Counsel should have sought the records by a subpoena, Counsel for Respondent urges that I give no credence to McDuffie's testimony regarding Respondent's hiring hall records. At the outset, I agree that the best evidence of the contents of Respondent's hiring hall records would have been the records themselves and that counsel for the General Counsel's explanation for why the General Counsel decided against subpoenaing Respondent's dispatch records was rather superficial. Nevertheless, counsel for the General Counsel's trial tactic of using secondary evidence as proof of the dispatch records was clearly permissible. Thus, Rule 1004 of the Federal Rules of Evidence permits secondary evidence when the originals are under the control of the adverse party and the latter has been placed on notice that the contents would be at issue. Herein, Respondent clearly controls its own dispatch records and, from the allegations of the second amended complaint, was on notice that the contents or said records were at issue. Thus, the real issue herein is not the admissibility of McDuffie's testimony, the secondary evidence, but, rather, the weight to be accorded such evidence.

[35] While the hearsay nature of McDuffie's notes is evident, General Counsel's Exhibit No. 9, for example, was not offered or admitted for its truth but, rather, as corroboration of McDuffie's trial testimony. Moreover, given McDuffie's testimony and

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uncontroverted.[36] In this regard, it is of cardinal significance that Respondent had in its possession the very documents, its dispatch records, which would have established whether, in fact, McDuffie's testimony, the basis for the General Counsel's *prima facie* case, was fallacious, and, in my view, as the sole custodian of said records, Respondent's failure to produce and to utilize said records at the hearing to contradict the Charting Party's testimony ". . . creates an adverse inference that such evidence in its possession is not favorable to Respondent's case." Ohio Valley Carpenters Union(Catalytic, Inc.), 267 NLRB 1223, 1229 at n. 13 (1983); Seafarers" Intl. Union (American Barge Lines), 244 NLRB 641, 642 (1979).

Counsel for Respondent's arguments against the drawing of such an adverse inference are not persuasive. Counsel initially argues that Polland is deceased and, thus, unavailable to authenticate and explain Respondent's dispatch records. However, as business records, the dispatch documents would have required minimal authentication, a task Respondent's current custodian of its records could certainly have performed, and, while Polland's explanations may have been helpful, their use would have been as impeachment material, requiring little explanation.[37] As to counsel's second argument (". . . the Union has no idea whether these particular papers, from a few years before Polland's death, even still exist in storage"), he failed to raise any question regarding the continued existence of Respondent's dispatch records during the hearing and offered no evidence that Respondent engaged in any sort of fruitless search for the documents and, in his post-hearing brief, merely speculated that said documents no longer exist. Further, for counsel to suggest, as he does, that only a subpoena would have caused a search to be undertaken for the applicable documents is specious. The second amended complaint placed Respondent on notice that the dispatch records would be crucial in this matter. Clearly, their relevance and necessity should have been apparent. As to counsel for Respondent's third argument, which relies upon Forsythe Electric Co., 332 NLRB No. 68 (2000), contrary to the administrative law judge's conclusions therein, McDuffie's testimony did not consist of mere "speculation or conjecture." Rather, it was factual based, in significant part, upon her view of Respondent's dispatch records, and, as I stated earlier, while her notes may, in fact, be hearsay, they were neither offered nor admitted for the truth of their contents. Instead, they were offered as corroboration of her testimony. In the foregoing circumstances, I have decided to, and shall, give credence to the testimony of Odessa McDuffie with regard to the events and incidents at issue herein.

Based upon the record as a whole and upon the testimony of McDuffie, I find that, at all times material herein, Polland administered Respondent's dispatching procedure by referring

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Polland's admission, during her deposition, that Respondent does not permit photocopying of its dispatch hall records, it seems likely that Respondent did, in fact, deny the Charging Party's request to photocopy portions of the dispatch records, which she viewed. In these circumstances, it is quite disingenuous of counsel to argue that McDuffie's notes should be accorded no weight. Whether Respondent's refusal to permit photocopying constituted an unfair labor practice shall be considered *infra*.

[36] I draw no adverse inference from the fact that, due to the death of Polland and serious illness suffered by Wiley, Respondent was unable to offer the testimony of either agent in its defense.

[37] For example, the records would either corroborate or contradict McDuffie that McGlone, Vasquez, and Saladino each placed his or her name on the out-of-work roster in January 1999 subsequent to her doing so. The contents of the documents would have been self-explanatory.

job applicants in order, commencing with the name at the top of the out-of-work roster, subject to the needs of the employers and each applicant's possession of the requisite skills and equipment to perform the required work;[38] that, in order to be eligible for a job referral, an applicant must call Respondent's hiring hall immediately upon completing his last job and again between the 15th and 17th day of each month in order to retain his or her position on the out-of-work roster; and that McDuffie possessed the requisite skills to perform the various types of wardrobe work and owned all the requisite equipment for the various jobs. Further, I find that, upon completion of her job with *Phantom of the Opera* in early January, the Charging Party telephoned Respondent's dispatch hall and placed her name on the out-of-work roster; that, having neglected to do so on the 15th, 16, or 17th, she lost her position on the roster; that she did not telephone the dispatch hall until January 20, and, consequently, on said date, her name was placed on the bottom of the out-of-work roster; that she again telephoned the dispatch hall during the 15th to the 17th of February in order to retain her position on the roster; that, in the first two or three days of March, Polland telephoned McDuffie and offered her a job with *Disney on Ice* beginning later that night; and that, after McDuffie said she would have to have a sty removed from an eye later in the day, Polland suggested that she not take the job and she would retain her place on the out-of-work roster. I further find that Mark Saladino, Alexis Vasquez, and William McGlone each registered on Respondent's out-of-work list subsequent to January 20 with their names below that of McDuffie; that, rather than McDuffie, Saladino and Vasquez were dispatched and began working on the show *Evita* in mid-February; and that, rather than McDuffie, McGlone was dispatched and began working on the play *Rent* in early March. Next, I find that, rather than McDuffie, whose name was at or next to the top of the out-of-work roster at the time, Forrest Dobbs, and another individual were dispatched to the play, *Big River*, in San Jose and began working on said play on March 8.[39] Further, I find that, on or about March 17, McDuffie received a job referral for work with the Mark Morris dance troupe; that, subsequently, in August, she received a referral to work on the play, *Jekyll and Hyde*; and that, immediately after said show ended its run on August 29, she telephoned Respondent's dispatch hall and placed her name on the out-of-work roster. Finally, I find that McGlone and Karrin Kain completed their work on the play *Rent* on September 7; that they subsequently placed their names on the out-of-work list; and that each was dispatched to work on the show, *Sunset Blvd.*, in October; however, as there is no record evidence that McDuffie telephoned the dispatch hall on the 15th, 16th, or 17th of September and retained her position on the out-of-work roster,[40] I can not find that Respondent bypassed her in order to dispatch McGlone and Kain.

Based upon the foregoing, the conclusion is warranted, and I find, that Respondent clearly ignored and deviated from its established dispatch hall procedures by bypassing McDuffie and dispatching others to jobs on three separate occasions. In this regard,

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[38] Notwithstanding that no mention is found in Respondent's constitution and by-laws and said document is specific as to the criteria for referrals, the dispatch procedure seems to be basically a first in-first out system. Thus, in her deposition, Polland admitted that, while the employer's needs and the applicants' skills, availability, and ownership of necessary equipment are factors and by name requests may be made, applicants' names climb on the out-of-work roster as referrals are made and dispatches are made from the top of the list.

[39] I note that, in his position statement, dated April 5, 2000, counsel for Respondent corroborated that the above individuals were dispatched to jobs rather than McDuffie.

[40] The lack of record evidence on this point is crucial inasmuch as McDuffie conceded failing to telephone the dispatch hall during the January 15 to 17 time period.

notwithstanding that McDuffie placed her name on the out-of-work roster in January prior to either Saladino, Vasquez, or McGlone doing so, that, in March, her name was at or next to the top of the roster, and that she was fully qualified and available for each job, Respondent dispatched Saladino and Vasquez to *Evita*, McGlone to *Rent*, and Dobbs to *Big River*. At no point has Respondent claimed that these departures from its normal dispatching procedures were pursuant to a valid union security clause or were necessary to the effective performance of its representative function, and, while, in his April 2000 position statement, counsel for Respondent set forth explanations for his client's bypassing of McDuffie on the above-described occasions, at the trial, he offered no evidence to establish his assertions as fact. Moreover, in dispatching the above individuals rather than McDuffie, I believe that Respondent acted in an arbitrary and invidious manner and was motivated by discriminatory reasons. Thus, while McDuffie worked on *Phantom of the Opera*, she engaged in significant protected concerted activity-- filing charges with the Board, one of which resulted in Respondent engaging in a protracted battle with the General Counsel over an investigatory subpoena issued to Anne Polland, and actions with the EEOC, running against Polland for the position of business agent, and championing a petition campaign to change its dispatching procedures—against Respondent's interests and those of Polland. Teamsters Local Union No. 174 (Totem Beverages), 226 NLRB 690, 700 (1976). That Polland, on behalf of Respondent, was bent upon retaliating against McDuffie seems obvious, for, unable to do so during the years she worked on *Phantom of the Opera*, within six weeks of the re-emergence of her name on its out-of-work roster, Polland bypassed her for three jobs, one of which was for a one month job and another for a six month job. The timing of its actions against McDuffie suggests that Respondent acted arbitrarily and invidiously and for discriminatory reasons, and I so find. In these circumstances, Respondent's acts and conduct constituted violations of Section 8(b)(1)(A) and Section 8(b)(2) of the Act. Boilermakers Local 374 (Construction Engineering), supra.

Turning to the allegation of the second amended complaint, that Respondent violated Section 8(b)(1)(A) of the Act by failing and refusing to permit McDuffie to photocopy dispatch hall records, McDuffie was uncontroverted that, during her visit to Respondent's dispatch hall office on April 5, Tomianne Wiley denied her request to make photocopies of various dispatch records. Corroborative of McDuffie's testimony was Anne Polland's admission that Respondent's practice was, indeed, to deny permission to employees to photocopy dispatch records. In these circumstances, I credit the testimony of McDuffie and find that, on April 5, Respondent denied her permission to photocopy documents from its dispatch records. In this regard, an aspect of a labor organization's obligation of fair representation is the requirement to permit an employee to have access to job referral information to ascertain his relative position in order to protect his job referral rights. Teamsters Local 282 (AGC of New York), 282 NLRB 733, 735 (1986). Moreover, concluding that ". . . the right to photocopy is a corollary to the right of access to referral records," the Board holds that "when a member seeks photocopies of hiring hall information because he reasonably believes he has been treated unfairly by the hiring hall, the union acts arbitrarily by denying the requested photocopies, unless the union can show the refusal is necessary to vindicate legitimate union interests." Boilermakers Local 197 Northeastern State Boilermaker Employers), 318 NLRB 205 at 205 and at n. 2 (1995); Operating Engineers, Local 3 (Kiewit Pacific Co.), 324 NLRB 14 (1997). Two points seem clear from the foregoing. First, as part of its *prima facie* case, the General Counsel must establish that the employee reasonably believed he or she had been treated unfairly by the hiring hall, and second, if he or she had such a reasonable belief, the employee's right to access to photocopies of its hiring hall records is an absolute one unless the labor organization is able to establish its refusal was necessary to protect its legitimate interests. Herein, I believe McDuffie credibly testified that, between being offered the *Disney On Ice* and the Mark Morris jobs, she thought there were other jobs to which she should have been referred but was not and that her belief was based upon conversations with other members of Respondent, newspaper reports,

and advertisements. While counsel for Respondent may be correct that McDuffie "did not have an iota of evidence" Respondent had violated its rules with regard to referring her to jobs, such, of course, is not the requirement of the Board, and there is no evidence that she was acting in bad faith in requesting to view Respondent's dispatch records. Operating Engineers Local 3, supra.[41] Moreover, Respondent offered no evidence that its refusal to permit McDuffie to photocopy records was necessary to protect any vital interests. In these circumstances, I find that Respondent engaged in conduct violative of Section 8(b)(1)(A) of the Act by refusing to permit McDuffie to photocopy dispatch hall records, necessary for her to ascertain if she was being treated unfairly by Respondent for referrals to jobs. Id; Boilermakers Local 197, supra.

CONCLUSIONS OF LAW

1. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

2. SHN and AMTSJ are each employers affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The referral and hiring past practices of SHN and Respondent establish the existence of an exclusive dispatching relationship between the parties for the dispatching of wardrobe employees by Respondent and the hiring of such employees by SHN.

4. The collective-bargaining agreement between AMTSJ and Respondent establishes the existence of an exclusive referral procedure between the parties.

5. By referring Mark Saladino and Alexis Vasquez to the SHN production of *Evita* in February rather than McDuffie in retaliation for the latter's protected concerted activities, Respondent breached its duty of fair representation and engaged in acts and conduct violative of Section 8(b)(1)(A) and Section 8(b)(2) of the Act.

6. By referring William McGlone to the SHN production of *Rent* in February or March rather than McDuffie in retaliation for the latter's protected concerted activities, Respondent breached its duty of fair representation and engaged in acts and conduct violative of Section 8(b)(1)(A) and Section 8(b)(2) of the Act.

7. By referring Forrest Dobbs to the AMTSJ production of *Big River* in March rather than McDuffie in retaliation for the latter's protected concerted activities, Respondent breached its duty of fair representation and engaged in acts and conduct violative of Section 8(b)(1)(A) and Section 8(b)(2) of the Act.

8. By arbitrarily refusing to permit McDuffie to photocopy certain documents from its hiring hall books and records when she reasonably believed she was improperly denied referrals, Respondent breached its duty of fair representation in violation of Section 8(b)(1)(A) of the Act.

9. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

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[41] In his post-hearing brief, counsel asserts that McDuffie requested to photocopy dispatch hall records in order to harass Polland. There is no record evidence to support such an allegation.

10. Unless specifically found above, Respondent engaged in no other unfair labor practices.

THE REMEDY

Having found that Respondent engaged in serious unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act and Section 8(b)(2) of the Act, I shall recommend that it be ordered to cease and desist from said unlawful acts and conduct and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. I have found that Respondent unlawfully bypassed Odessa McDuffie for referral to *Evita*, *Rent*, and *Big River* for arbitrary, capricious, and discriminatory reasons. Of course, the standard remedy is to recommend that Respondent be ordered to make McDuffie whole for any loss of earnings, which she suffered as a result of its acts of misconduct, and I shall so do so. However, I note that, if McDuffie had been offered referral to *Evita*, and I must assume she would have accepted the dispatch rather than lose her position on the out-of-work roster, her employment would have lasted from February 17 through March 14, 1999, and, in such circumstances, she would have been unavailable for dispatch to either of the other two shows. Therefore, it would antithetical to the purposes and policies of the Act to award her back pay for Respondent's failure to dispatch her to either *Rent* or *Big River.* Accordingly, I shall recommend that Respondent be ordered to make McDuffie whole only for the earnings she would have received had she been dispatched, rather than unlawfully bypassed for referral, to *Evita*. Backpay shall be computed in accordance with the Board's decision in F. W. Woolworth Co., 90 NLRB 289 (1950) with interest to be computed in the manner prescribed in New Horizons for the Retarded, 283 NLRB 1173 (1987).

On the above-described findings of fact and conclusions of law and on the entire record, I issue the following recommended[42]

ORDER

The Respondent, Theatrical, Wardrobe Union, Local 784, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from:

(a) Breaching its duty of fair representation by discriminatorily bypassing employee/members and other applicants for dispatch to jobs, for which they were qualified and available, in retaliation for their protected concerted activities;

(b) Breaching its duty of fair representation by arbitrarily refusing to permit employee/members or other applicants to photocopy referral records when they reasonably believe they have been improperly denied referrals;

(c) In any like or related manner, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[42] If no exceptions are filed as provided by Sec.102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Refer its employee/members and other applicants for referral to positions of employment for which they are qualified in an equal and nondiscriminatory basis;

(b) Within 14 days from the date of this Order, make Odessa McDuffie whole for any loss of earnings, which she may have suffered by reason of its breach of its duty of fair representation and its discrimination against her, in the manner set forth in the Remedy section herein;

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order;

(d) Within 14 days after service by the Region, post at its office in San Francisco, California copies of the attached notice marked "Appendix."[43] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employee/members and former employee/members since February 15, 1999

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: January 27, 2003

_____

Burton Litvack
Administrative Law Judge

[43] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

WE WILL NOT breach our duty of fair representation by discriminatorily bypassing employee/members or other applicants for dispatch to jobs, for which they are qualified and available, in retaliation for their protected concerted activities.

WE WILL NOT breach our duty of fair representation by arbitrarily refusing to permit employee/members or other applicants to photocopy referral records when they reasonably believe they have been improperly denied referrals.

WE WILL NOT, in any like or related manner, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL refer our employee/members and other applicants to positions of employment, for which they are qualified, in a non-discriminatory manner.

WE WILL, within 14 days from the date of the Board's Order, make Odessa McDuffie whole for any earnings she lost as a result of our discriminatory bypassing of her for dispatch to jobs for which she was available and qualified.

THEATRICAL, WARDROBE UNION
LOCAL 784, INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES AND MOVING
PICTURE MACHINE OPERATORS OF THE
UNITED STATES AND CANADA

(Labor Organization)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

901 Market Street, Suite 400, San Francisco, CA 94103-1735
(415) 356-5130, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (415) 356-5139.